Supreme Court, U.S.
FILED
MAR 17 1994
OFFICE OF THE CLERK

No. 93-1314

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LASZLO N. TAUBER, M.D.
Petitioner,
v.
SALOMON FOREX, INC., SALOMON INC., SALOMON BROTHERS, INC., AND FRED GATLING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE BOARD OF TRADE OF THE CITY OF CHICAGO AND CHICAGO MERCANTILE EXCHANGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARK D. YOUNG
(Counsel of Record)
PAUL T. CAPPUCCIO
KRISTEN ALLMAN DENISON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

JERROLD E. SALZMAN
JAMES T. MALYSIAK
FREEMAN, FREEMAN & SALZMAN, P.C.
401 N. Michigan Avenue
Suite 3200
Chicago, Illinois 60611
(312) 222-5100

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF THE *AMICI CURIAE*	1
INTEREST OF THE *AMICI CURIAE*	2
THE PROCEEDINGS BELOW	4
ARGUMENT	7
THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS, DISRUPTS THE CEA'S STATUTORY SCHEME AND CREATES FINANCIAL MARKET CONFUSION	7
A. Multiple Circuit Conflicts	8
1. "Transactions In"	8
2. "Board of Trade"	11
3. Ramifications of the Conflicts	12
B. The Decision Raises Important Federal Questions	13
1. Threat to the CEA and the *Amici*	13
2. Market Confusion and Uncertainty	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases Page

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) .. 15
Abrams v. Oppenheimer Gov't Sec., Inc., 737 F.2d 582 (7th Cir. 1984) 9
Bank Brussels Lambert, S.A. v. Intermetals Corp., 779 F. Supp. 741 (S.D.N.Y. 1991) 9
Board of Trade v. Securities and Exchange Comm'n, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) 8, 11, 18
CFTC and State of Georgia v. Sterling Capital Co., Comm. Fut. L. Rep. (CCH) [1980-82 Transfer Binder] ¶ 21,169 (N.D. Ga.), *modified by*, Comm. Fut. L. Rep. (CCH) [1980-82 Transfer Binder] ¶ 21,170 (N.D. Ga. 1981) 9
Chicago Mercantile Exchange v. SEC, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) 9
Commissioner of Internal Revenue v. Clark, 489 U.S. 726 (1989) 15
Commodity Future Trading Commission v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1980) 7, 11, 12
Commodity Futures Trading Commission v. The American Board of Trade, Inc., 803 F.2d 1242 (2d Cir. 1986) 8
Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., Fed. Sec. L. Rep. (CCH) [1982 Transfer Binder] ¶ 98,867 (S.D.N.Y. 1982) 18
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 2, 7
Point Landing v. Omni Capital Int'l, Ltd., 795 F.2d 415 (5th Cir. 1986) 18

Statutes

7 U.S.C. § 1a(1) 5, 11
7 U.S.C. § 1a(3) 3, 9
7 U.S.C. § 1a(5) (A) (II) 10
7 U.S.C. § 1a(11) 4
7 U.S.C. § 2(i) 9, 10

TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. § 2(ii)	5, 11
7 U.S.C. § 2a(i)	3, 14
7 U.S.C. § 5	9, 10
7 U.S.C. § 6(a)	3, 6, 7, 9, 15
7 U.S.C. § 6(c)	3
7 U.S.C. § 6(c)(2)	15
7 U.S.C. § 6b	7, 9
7 U.S.C. § 6c	7
7 U.S.C. § 6c(b)	3, 10
7 U.S.C. § 6c(f)	3, 14
7 U.S.C. § 6d	7
7 U.S.C. § 6e	7
7 U.S.C. § 6f	7
7 U.S.C. § 6g	7
7 U.S.C. § 6i	7, 8
7 U.S.C. § 6k	7
7 U.S.C. § 6m	7
7 U.S.C. § 6o	7
7 U.S.C. § 7	3, 7
7 U.S.C. § 8	3, 7
7 U.S.C. § 9	7, 8
7 U.S.C. § 12(d)	8
7 U.S.C. § 13(a)(2)	8
7 U.S.C. § 20	8
15 U.S.C. § 77b(1)	3, 14
15 U.S.C. § 78c(a)(10)	3, 14
Legislative Materials	
120 *Cong. Rec.* 34736 (Oct. 9, 1974)	17
120 *Cong. Rec.* 34997 (Oct. 10, 1974)	17
Administrative Materials and Rules	
17 C.F.R. § 32.4	3, 4
17 C.F.R. § 32.11	3
52 Fed. Reg. 47022 (1987)	15
Other Authorities	
Brief *Amicus Curiae* of the Commodity Futures Trading Commission, *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993) (No. 92-1406)	17

TABLE OF AUTHORITIES—Continued

	Page
Carol Loomis, *The Risk That Won't Go Away*, Fortune, March 7, 1994 at 40	2
CFTC, *The Report of the CFTC: OTC Derivative Markets and Their Regulation* (October 1993)	18
J.R. Laing, *The Next Meldown?*, Barron's, June 7, 1993 at 10	15
S. Selig, Chair, *Report of the ABA Committee on Futures Regulation* (Dec. 20, 1993)	18
SEC-CFTC Jurisdictional Correspondence, Comm. Fut. L. Rep. (CCH) [1975-77 Transfer Binder] ¶ 20,117 (Dec. 3, 1975)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1314

LASZLO N. TAUBER, M.D.
Petitioner,

v.

SALOMON FOREX, INC., SALOMON INC.,
SALOMON BROTHERS, INC., AND FRED GATLING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE BOARD OF TRADE OF THE CITY OF CHICAGO AND CHICAGO MERCANTILE EXCHANGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF THE *AMICI CURIAE*

The Board of Trade of the City of Chicago and the Chicago Mercantile Exchange provide markets where futures contracts and options on futures contracts are traded. The Board of Trade and CME support granting the petition for a writ of certiorari and urge this Court ultimately to overturn the court of appeals' decision. Both parties consent to the filing of this brief *amici curiae*.[1]

[1] The written consents have been submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

"Derivatives are contracts whose value is derived—the key word—from the value of some underlying asset . . . ." Carol Loomis, *The Risk That Won't Go Away*, Fortune, March 7, 1994, at 40. The court of appeals' decision applies to two kinds of derivatives—futures and options —whose value derives from two kinds of assets: government securities and foreign currency.

Like other derivatives, futures and options fulfill a dual purpose; to allow businesses to manage price risks they face (for example, that currency values will fluctuate or interest rates will change) and to provide a means for speculators to assume the risks those businesses want to avoid. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357-59 (1982). Futures and options are not generally traded by the retail public. Approximately 98% of all futures and options traded on the Board of Trade and CME are entered into by institutions or professional traders.

In 1993, the Board of Trade traded 178,773,105 futures and options contracts. Of that total, over 75% of all contracts traded involved government securities. The Board of Trade traded 102,863,608 Treasury Bond (30 Year) futures and options and 32,086,831 Treasury Note (10, 5 and 2 Year maturities) futures and options for a total of 134,950,439 contracts involving government securities.

The CME traded last year 146,746,990 futures and options contracts. Of that total, over 26% involved foreign currency.[2] In 1993, the CME traded 39,377,170 futures and options contracts involving Australian Dollars, British Pounds, Canadian Dollars, Deutsche Marks, French Francs, Japanese Yen and Swiss Francs.

---

[2] The most heavily-traded CME futures and options markets involve Eurodollars, instruments that are not directly affected by the court of appeals' decision.

Each government security and foreign currency that is the subject of a futures contract is a "commodity" under the Commodity Exchange Act. 7 U.S.C. § 1a(3). The CEA regulates all trading in "commodity" futures contracts and options on those futures as well as options on certain "commodities," including currencies.[3] Subject to specific exceptions, the CEA requires all futures and options to be traded on "contract markets" that have been designated by the Commodity Futures Trading Commission. 7 U.S.C. §§ 6(a), 6c(b); 17 C.F.R. § 32.11.[4] The Board of Trade and CME have been designated by the CFTC as "contract markets." 7 U.S.C. §§ 7 and 8. The CEA's comprehensive regulatory scheme thus applies to the millions of government securities and currency futures and options contracts that are traded on the Board of Trade and CME.

The court of appeals' decision permits dealers operating outside a regulated exchange to escape the CEA by selling government securities and currency futures and options contracts for execution in the dealers' own back offices, rather than through the open and competitive facilities of a designated contract market. As a result, major Board of Trade and CME product lines now may be expropriated by off-exchange dealers and purveyed in an unregulated, less costly manner to the same institu-

---

[3] The CFTC does not regulate options on "commodities" that are also securities, including government securities, and options on currencies traded on securities exchanges; those options are "securities" under the federal securities laws. 7 U.S.C. §§ 2a(i) and 6c(f); 15 U.S.C. §§ 77b(1) and 78c(a)(10). None of the transactions involved in this case is a security.

[4] In 1992, Congress enacted 7 U.S.C. § 6(c), which allows the CFTC to exempt futures contracts from the contract market designation and other statutory requirements "consistent with the public interest." CFTC rules already exempt "trade options" from the contract market designation requirement. 17 C.F.R. § 32.4. An option qualifies as a trade option when it is sold to a business and involves a commodity used by the business.

tions and professionals that now trade on the Board of Trade and CME. In that way, the court of appeals' decision threatens both to undermine the regulatory safeguards of the CEA and to inflict substantial competitive harm on the *amici*. In addition, the court of appeals' decision has created vast areas of statutory ambiguity which could undermine U.S. financial markets and cause market participants to shift their activities to overseas markets.

THE PROCEEDINGS BELOW

This case arose out of a trading dispute between the Petitioner, Dr. Laszlo Tauber, and the Respondents, a foreign currency dealer and related parties referred to collectively as "Salomon." Over a period of 2½ years, Salomon and Tauber entered into 2,702 currency transactions with each other. (2a)[5] At the end of that period, Salomon sued Tauber claiming he owed close to $26 million in unpaid losses. Tauber defended and counterclaimed by arguing, among other things, that the transactions at issue were unenforceable. Tauber asserted the contracts were futures and options that violated the CEA's mandate that all trading must be conducted on designated contract markets.

Salomon replied that the contracts were permissible under the CEA since they were forward contracts, not futures, and "trade options." Both kinds of instruments are not required to be traded on a designated contract market. 7 U.S.C. § 1a(11); 17 C.F.R. § 32.4. Salomon also argued that the contracts were excluded from the CEA under the Treasury Amendment since they were traded off-exchange.

That Amendment states:

> "Nothing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign

[5] Citations to the lower court opinions will be to pages in the Petition's Appendix.

> currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade."

7 U.S.C. § 2(ii). The Amendment thus excludes from the CEA any transaction that is found to be a "transaction in" one of the enumerated instruments, unless that transaction involves futures trading on a "board of trade." [6]

In granting summary judgment for Salomon, the district court ruled, solely on the basis of the Amendment, that the Tauber-Salomon transactions were not subject to the CEA. The district court

> 1) did not resolve the factual dispute over whether the transactions were futures or forwards or trade options, but presumed (without deciding) that the contracts were futures and non-trade options (30a n.4);
>
> 2) found that "[a]lthough the transactions in this case involved sales for future delivery, none was conducted on a board of trade" (35a); instead, "[t]hey were . . . conducted off-exchange" (30a); and
>
> 3) held that the "Amendment is unmistakably clear and unambiguous on its face. *All* transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA." (42a-43a) (Emphasis added.)[7]

---

[6] The CEA defines "board of trade" to mean "any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment." 7 U.S.C. § 1a(1).

[7] In the CEA, Congress defines futures contracts to be any "contract for the purchase or sale of a commodity for future

The court of appeals affirmed. It also treated the transactions at issue as futures and options (2a-3a; 19a) and found that the statutory "clause 'transactions in foreign currency' " included *"all* transactions in which foreign currency is the subject matter, including futures and options." (16a) While recognizing that the Amendment did not exclude transactions "conducted on a board of trade" (15a), the court of appeals claimed not to be deciding whether the Tauber-Salomon transactions were conducted on a "board of trade" (11a n.5). Later in its opinion, however, the court of appeals implicitly decided that the Salomon dealer market was not a "board of trade" by treating "organized exchange" as synonymous with "board of trade" and observing that the "statute commands . . . the exemption of all trading off organized exchanges." (20a) The court of appeals ultimately interpreted the Amendment to exclude "*all* off-exchange transactions in foreign currency, including futures and options, . . . from regulation by the CEA." (17a) (Emphasis added.) Thereafter, the court of appeals tried to temper that broad holding by asserting that the Amendment's exclusion applies to off-exchange currency futures and options "between sophisticated, large-scale foreign currency traders." (22a)

---

delivery." 7 U.S.C. § 6(a). The district court used the term "future delivery" to emphasize that its holding would exclude futures contracts from the CEA.

ARGUMENT

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS, DISRUPTS THE CEA'S STATUTORY SCHEME AND CREATES FINANCIAL MARKET CONFUSION.

The CEA provides a comprehensive regulatory scheme for futures and options trading. (5a) In addition to requiring all futures and options to be traded on designated contract markets, the CEA prohibits fraud and manipulation, requires market professionals to register, file reports and maintain books and records, and provides financial protections for market participants and their transactions. 7 U.S.C. §§ 6(a), 6b, 6c, 6d, 6e, 6f, 6g, 6i, 6k, 6m, 6o, 7, 8, and 9.

Certain CEA provisions also apply to cash and forward transactions. These are contracts where the parties actually contemplate performing their contractual obligations at the contracts' maturity—either through delivery of the commodity involved or payment of a cash equivalent.[8] In contrast, no more than 3% of all futures and options contracts result in delivery or performance at maturity. Instead, most futures and options are offset, a process

> "by which purchasers or sellers can liquidate their positions by forming opposite contracts. The price differential between the opposite contracts then determines the investor's profit or loss."

Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc. 680 F.2d 573, 579-580 (9th Cir. 1980). *See also Merrill Lynch*, 456 U.S. at 359 n.9. Cash and forward contracts are subject to various CEA provisions including reporting requirements, antimanipulation pro-

[8] For cash transactions, the contract's maturity is immediate—*e.g.* seller sells to buyer today. For forward transactions, the contract matures sometime in the future—*e.g.* seller sells to buyer for delivery in 90 days.

tections, and CFTC investigatory powers. 7 U.S.C. §§ 6i, 9, 12(d), 13(a)(2) and 20.

No one disputes that the Amendment excludes from the CEA cash and forward contracts in currencies and government securities. The issue the court of appeals faced was whether the Amendment also excludes currency and government security futures and options from the CEA's many regulatory mandates.

A. Multiple Circuit Conflicts.

Under the Amendment, the CEA does not apply to any transaction that meets both of two tests:

1) The transaction is a "transaction in" one of the enumerated instruments (currencies or government securities).

2) The transaction is not "conducted on a board of trade."

The Fourth Circuit misapplied each test and created multiple Circuit conflicts.

1. *"Transactions In."* The Fourth Circuit read the phrase "transactions in" to include futures and options contracts. (16a) The Second and Seventh Circuits disagree, as does every other court that has ruled on that phrase in the Amendment. *Commodity Futures Trading Comm'n v. The American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) ("agree[s]" with the district court that "an option to buy or sell foreign currency is not a purchase or sale of the currency itself and hence is not a transaction 'in' that currency"); *Board of Trade v. Securities and Exchange Comm'n*, 677 F.2d 1137, 1146, 1154 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) (citations omitted) ("Nor are GNMA options 'transactions in government securities.' The option transaction is a long step removed from a transaction *in* the commodity involved . . .." "Congress understood the difference between 'transactions in' and 'transactions

involving.'"). *See also Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 589-591 (7th Cir. 1984) (Amendment excluded GNMA forwards, not futures, from CEA); *CFTC and State of Georgia v. Sterling Capital Co.*, Comm. Fut. L. Rep. (CCH) [1980-82 Transfer Binder] ¶ 21,169 at 24,783-84 (N.D. Ga.), *modified by*, Comm. Fut. L. Rep. (CCH) [1980-82 Transfer Binder] ¶ 21,170 (N.D. Ga. 1981) (currency options are not "transactions 'in' foreign currency" under the Amendment); *Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741, 748-50 (S.D.N.Y. 1991) (Amendment excluded cash currency transactions, not futures).

The Second and Seventh Circuit's conclusion that cash and forward contracts are "transactions in," but futures and options are not, turned on a natural and logical reading of that phrase. In any cash or forward transaction, the seller contemplates actually delivering, for example, currency or government securities to the buyer at an agreed to price. Those parties have entered into literally a transaction in the commodity. Most futures or options do not result in delivery; they are trading instruments that reflect the market participants' perceptions of the future value of an underlying commodity—whether it be currency, government securities or soybeans. As such, futures and options "[t]rading occurs in 'the contract,' not in the commodity." *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).[9]

---

[9] When Congress refers to futures in the CEA it uses the term "future delivery." *See e.g.*, 7 U.S.C. § 1a(3) ("contracts for future delivery"); § 2(i) ("contracts of sale of a commodity for future delivery"); § 5 ("[t]ransactions in commodities involving the sale thereof for future delivery"); § 6(a) ("contract for the purchase or sale of a commodity for future delivery"); and § 6b (treats separately "any contracts of sale of any commodity" and "any contract of sale of any commodity for future delivery"). Congress did not refer to "future delivery" in the Amendment's

Under the Second and Seventh Circuit's view, the Amendment excludes cash forward transactions in currencies and government securities from the otherwise applicable CEA provisions dealing with manipulation, reporting and CFTC investigations. The Fourth Circuit disagreed, claiming the Amendment would be superfluous if applicable only to cash forward transactions since the CEA already completely excluded those transactions from regulation. (6a; 16a) That view overlooks those CEA requirements that do apply to cash forward transactions. *See supra* 7-8.

The Fourth Circuit attempted to reconcile its decision with those of the Second and Seventh Circuits by claiming that those decisions turned on *who* could enter into the transactions and *where* the transactions occurred, *i.e.* "on-exchange" transactions as opposed to "off-exchange." (20a-22a) The Amendment, however, never refers to the identity of the parties that could enter into excluded contracts. The Amendment's second test does address where an excluded transaction could occur—the transaction may not be "conducted on a board of trade." That second test applies to only transactions that meet the first test, the "transactions in" test. The Second and Seventh Circuits simply held that options and futures did not meet that test as "transactions in." [10]

"transactions in" clause, an omission the court of appeals ignored. Congress also generally described options when it wanted a provision to apply to options. 7 U.S.C. §§ 1a(5)(A)(II), 2(i), 5, and 6c(b). The Treasury Amendment never mentions options.

[10] The court of appeals read the "transactions in" test to be dependent on the "board of trade" test and found that the second test would have no meaning unless "transactions in" included futures and options. (15a) That argument ignores the fact that most futures contracts traded on a board of trade and held to maturity result in an obligation to make or take delivery of a commodity. That delivery process constitutes a transaction "in" the commodity. The Amendment brings back into the CEA those "transactions in" currency or government securities which "involve" futures

2. *"Board of Trade."* If the Fourth Circuit correctly extended "transactions in" to futures and options, then those transactions are excluded from the CEA "unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii). The court of appeals therefore had to decide whether the Tauber-Salomon futures and options contracts were "conducted on a board of trade." *See Board of Trade*, 677 F.2d at 1154 (if GNMA options are covered by "transactions in" then "the 'unless' clause would apply.").

The court of appeals either missed that required step or interpreted the term "board of trade" in a way that conflicts with the Ninth Circuit's decision in *Co Petro.* Unlike the district court, the court of appeals asserted it was withholding judgment on whether the Tauber-Salomon transactions were conducted on a board of trade (although it was "inclined" to say they were not). (11a n.5) Nevertheless, the court of appeals seemingly joined the district court in equating the term "exchange" with "board of trade." (22a; 30a; 35a). The Fourth Circuit concluded: the Amendment "distinguishes only between on-exchange and off-exchange trading." (20a)

No it doesn't. The Amendment distinguishes transactions "conducted on a board of trade" from off-board of trade transactions. The CEA does not equate a board of trade with an exchange. Rather, "board of trade" means "any exchange *or* association . . . of persons who are engaged in the business of buying or selling any commodity . . .." 7 U.S.C. § 1a(1) (Emphasis added).

The Ninth Circuit has rejected the very position the Fourth Circuit adopted—that off-exchange transactions necessarily are conducted "off-board of trade." *Co Petro*, 680 F.2d at 581-582. The Ninth Circuit held "the statutory definition of 'board of trade' . . . is broad enough to encompass" an off-exchange dealer in petroleum fu-

---

trading on a board of trade because they are part of the futures delivery process. *Board of Trade*, 677 F.2d at 1154 and n.33.

tures, whose activities paralleled those of Salomon here. *Id.* at 581. Indeed, in contrast to the Fourth Circuit's attempt to erase from the statutory "board of trade" definition everything after the word "exchange," the Ninth Circuit concluded (*id.*):

> "Where Congress has, as here, intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort."

3. *Ramifications of the Conflicts.* After the Fourth Circuit's decision, the CEA's coverage would be determined by geography. In the Second and Seventh Circuits (and maybe the Ninth Circuit due to *Co Petro's* "board of trade" holding), the CEA applies to all government securities and currency futures and options, except those options Congress expressly delegated to the SEC. *See supra,* at 3 n.3. In the Fourth Circuit, the CEA now does not cover all futures and options; by the simple expedient of off-exchange trading, the CEA's provisions may be avoided.

Financial markets are not as easily segregated as appellate circuits. The conflicts created by the Fourth Circuit therefore promote great uncertainty that will likely trouble all financial market participants. What would happen, for example, if a manufacturer in New York doing business overseas and a Chicago-based importer try to hedge their respective currency risks by entering into currency futures contracts with each other through a broker in Baltimore? Does the CEA apply to that transaction? Could either the New York manufacturer or Chicago importer invoke the CEA in an attempt to walk away from losses under the contract? Or would the party looking for payment on the contract prevail because the broker's situs within the Fourth Circuit excludes the instrument from the CEA?

Even without claims of illegality, the Circuit conflicts create irrational discrepancies. It makes no sense that futures and options traded off-exchange in New York

City or Chicago would be subject to the CEA, but the same activity would be outside the CEA if conducted in Baltimore. Congress enacted a federal regulatory scheme under the CEA to prevent such bizarre forum-determinative results. Thus, the Circuit conflicts presented here merit resolution by this Court.

B. The Decision Raises Important Federal Questions.

Even if no conflict existed, the Fourth Circuit's decision alone presents important federal questions warranting review. The court of appeals' decision eliminates statutory cornerstones, imposes a severe competitive handicap on the Board of Trade and CME and breeds uncertainty among market participants.

1. *Threat to the CEA and the Amici.* Under the Fourth Circuit's decision, off-exchange dealers may copy some of the most popular futures and options contracts traded on the Board of Trade and CME today, market those instruments to the same "sophisticated traders" that comprise 98% of the trading on the Board of Trade and CME and escape the CEA and all other regulatory costs. The decision creates a vast hole in the CEA and a competitive nightmare for the Board of Trade and CME.

One example illustrates the scope of the interests at stake. Assume a subsidiary of a Baltimore investment bank decided to make a market as a dealer in Swiss Franc futures (just like the contracts traded at the CME). According to the court of appeals, the off-exchange dealer and its futures transactions would be excluded from the CEA. The dealer and its contracts also would not be subject to any other scheme of market regulation.[11] If the dealer decided to operate markets in

[11] The dealer would not be subject to SEC jurisdiction because Swiss Franc futures, like all other futures and many options, do not fit within the definition of a security. After the Seventh Circuit ruled in *Board of Trade v. SEC* that virtually no derivatives were securities, Congress amended the definition of security to

any Treasury securities or other currency futures and options now being traded on the Board of Trade and CME, those transactions also would not be subject to the CEA or any other market regulation. Thus, the dealer could duplicate the major product lines of the Board of Trade and CME, sell those products to the Board of Trade's and CME's predominant client base and completely avoid the CEA and federal regulation.[12]

Putting aside the unfair competitive implications of that result, leaving off-exchange dealer markets in futures and options unregulated while exchange markets in the same type of instruments are heavily-regulated would only make sense if dealer markets were much less risky than exchanges. Just the opposite is true. As the CFTC has explained, exchange

> "markets provide safeguards to participants in futures and commodity option transactions, including open competitive trading, public price dissemination, and protection against counterparty credit risk, that are not generally available other than on exchange markets. . . . As a consequence, . . . [off-exchange] instruments . . . may be exchanged without the benefit of protections afforded participants in transactions effected on or pursuant to the rules of Commission designated exchange markets, including safeguards

---

include only certain specified options. 7 U.S.C. §§ 2a(i) and 6c(f); 15 U.S.C. §§ 77b(1) and 78c(a)(10).

[12] An investment bank's dealer subsidiary would not be subject to any regulation, including federal banking regulation. In contrast, any commercial bank subsidiary or affiliate that tries to operate as a dealer in government securities or currency futures and options would face some form of "safety and soundness" regulation by bank regulators. But even bank regulation is not a substitute for the CEA's market regulation. For example, bank regulators would have no direct jurisdiction over a bank's customer that perpetrates a fraudulent or manipulative scheme on other participants in the bank's dealer market.

against counterparty default and other transaction risks."

52 Fed. Reg. 47022 (1987). *See also* J.R. Laing, *The Next Meltdown?*, Barron's, June 7, 1993, at 10 (Salomon Chairman Warren Buffet "opines" exchanges have less risk than "bi-lateral, over-the-counter derivatives trading").

Congress agrees with that view. For 70 years, Congress and the CFTC permitted and regulated trading in futures on designated contract markets and banned non-contract market trading in futures. 7 U.S.C. § 6(a). Just recently, in 1992, Congress allowed that ban to be lifted, but only if the CFTC made certain specific "consistent with the public interest" statutory findings. 7 U.S.C. § 6(c)(2). Despite that congressional history, the Fourth Circuit construed the Amendment as if, in 1974, Congress intended to make superfluous the CEA's linchpin—the contract market designation requirement—for currency and government security futures and options. Statutory exemptions, however, should be narrowly construed. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption . . . must . . . be narrowly construed"); *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions such as [the tax code] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."). When, as here, a court of appeals decision adopts an overbroad reading of a statutory exclusion that nullifies central requirements of a federal regulatory scheme, that decision presents a significant issue for this Court's review.

2. *Market Confusion and Uncertainty.* The Fourth Circuit's decision also would create financial market confusion. As is often the case when courts try to redraw legislative policy lines, the court of appeals' decision involves imprecise and undefined terminology such as "in-

dividually-negotiated" and "sophisticated, large-scale foreign currency traders." (22a) Even assuming that "individually negotiated" is code for "off-exchange," [13] the possible interpretive issues created by a "large trader" standard will promote great uncertainty. What does "sophisticated" or "large-scale" mean? Is a failing savings & loan eligible? Should an insurance company, credit union, export manufacturer, commodity pool or pension fund of any size qualify? No one really knows.

An additional factor causing market uncertainty is that no one knows which part of the Fourth Circuit's opinion to follow. Is it the "statute commands" that "all trading off organized exchanges" in currencies and government securities futures and options is excluded from the CEA? (20a) That reading would allow bucket shops and boiler rooms to sell futures and options to the retail public, the most notorious evil the CEA's contract market designation requirement is designed to prevent. Or is it the decision's later attempt to rewrite and contradict that "statutory command" by allowing only "large traders" (22a) to trade unregulated off-exchange futures and options?

That confusion might be ameliorated somewhat if the government historically had adopted consistent views on the Amendment's meaning. But the government has offered disparate views on the Amendment's scope over the past two decades. Petition for Writ of Certiorari at 17-20. Even today, the Treasury Department and the CFTC would likely bicker over which branch of the Fourth Circuit's decision—the "statutory command" or "large traders only"—to follow. Indeed, they took opposite positions on that issue in their separate *amicus* briefs in the Fourth Circuit in this case.

---

[13] The Board of Trade now trades Flex Options which allow traders to customize through individual negotiation various options transactions involving government securities futures. Since exchanges now trade customized instruments, the line the court of appeals tried to draw is even more blurry.

The CFTC has even disagreed with itself over time. In 1975, the CFTC concluded that under the Amendment

> "the CFTC would not have any jurisdiction with respect to the purchase and sale of the enumerated financial instruments themselves (the 'cash market'), but would have jurisdiction solely with respect to futures trading in those instruments."

SEC-CFTC Jurisdictional Correspondence, Comm. Fut. L. Rep. (CCH) [1975-77 Transfer Binder] ¶ 20,117 at 20834 (Dec. 3, 1975). The CFTC analyzed the Amendment's 1974 legislative history and concluded the Amendment was enacted to remove the "Treasury's fear of CFTC cash market jurisdiction" over the enumerated instruments. *Id.* at 20834 n.13.

By 1992, the CFTC had adopted a far different reading of the 1974 legislative history. Based on that same history, the CFTC told the Fourth Circuit the Amendment was intended to exclude all off-exchange currency and government securities futures "between sophisticated and informed institutions that ordinarily trade in the enumerated financial instruments." Brief *Amicus Curiae* of the Commodity Futures Trading Commission at 10, *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993) (No. 92-1406). Under that reading, Congress wanted any trading covered by the Amendment to be excused from CEA regulation even if, as here, no other regulatory scheme applied.

The CFTC's 1992 position violates a cardinal principle of the 1974 CEA amendments, legislation that included the Amendment. In 1974, the Chairmen of the House-Senate Conference Committee both underscored:

> "It was the intent of the committees to fill all regulatory gaps—to regulate trading in futures and in options relating to commodities or commodity futures, because such trading is now poorly regulated, if it is regulated at all."

120 *Cong. Rec.* 34736 (Oct. 9, 1974) (Remarks of Rep. Robert Poage); 120 *Cong. Rec.* 34997 (Oct. 10,

1974) (Remarks of Senator Herman Talmadge). For that reason, courts have uniformly found the 1974 amendments to be designed to plug all regulatory gaps.[14] The CFTC's new position, as adopted by the Fourth Circuit, contravenes that vital and explicit congressional policy by establishing a regulatory void for futures and options traded off-exchange. By advancing a new construction of the Amendment without addressing the "regulatory gap" it would foster, the CFTC's 1992 view further exacerbates the legal confusion under the Amendment.

The Amendment has sparked widespread confusion. After the Fourth Circuit's decision, the CFTC itself acknowledged the uncertain state of the law. CFTC, *The Report of the CFTC: OTC Derivative Markets and Their Regulation*, at 155-56 (October 1993). Only three months ago, the Chairman of the American Bar Association's Committee on Futures Regulation characterized the "scope of the Treasury Amendment" after the Fourth Circuit's decision as "unsettled." S. Selig, Chair, *Report of the ABA Committee on Futures Regulation*, at 4 (Dec. 20, 1993).

Financial market participants are leery of such uncertainty. If foreign markets offer more legal certainty, futures and options business now conducted in the U.S. could easily be transported overseas through modern communications and other technologies. By reviewing this decision and resolving the conflicts and ambiguities now plaguing the important coverage issues the Amend-

---

[14] *See Board of Trade*, 677 F.2d at 1159 ("Congress believed it was filling a regulatory void . . ."); *Point Landing v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 420 (5th Cir. 1986) ("Congress intended the 1974 amendments to 'fill all regulatory gaps' while 'avoid[ing] unnecessary, overlapping and duplicative regulation' ") (citation omitted); *Gonzalez v. Paine, Webber, Jackson & Curtis, Inc.*, Fed. Sec. L. Rep. (CCH) [1982 Transfer Binder] ¶ 98,867 at 94,514 (S.D.N.Y. 1982) (1974 amendments " 'filled the protective regulatory gap' " once occupied by pre-1974 decisions finding federal securities laws applicable to commodity futures accounts) (citation omitted).

ment has generated, this Court would serve the short and long term needs of U.S. financial markets and their participants for legal certainty and sensible federal regulatory lines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. YOUNG
(Counsel of Record)
PAUL T. CAPPUCCIO
KRISTEN ALLMAN DENISON
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

JERROLD E. SALZMAN
JAMES T. MALYSIAK
FREEMAN, FREEMAN &
SALZMAN, P.C.
401 N. Michigan Avenue
Suite 3200
Chicago, Illinois 60611
(312) 222-5100

Date: March 17, 1994

Supreme Court, U.S.
FILED
MAR 24 1994
OFFICE OF THE CLERK

No. 93-1314

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LASZLO N. TAUBER, M.D.,
Petitioner,

v.

SALOMON FOREX, INC., SALOMON INC.,
SALOMON BROTHERS, INC., and FRED GATLING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

RICHARD G. TARANTO
(Counsel of Record)
H. BARTOW FARR, III
FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases Page

Abrams v. Oppenheimer Gov't Securities, 737 F.2d 582 (7th Cir. 1984) 5

Board of Trade v. SEC, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) 5

In re Bybee, 945 F.2d 310, 313 (9th Cir. 1991) 6

Statutes

7 U.S.C. § 6 6

§ 6c 6

§ 25 ..... 2, 3, 4

Other Authorities

The Lookalike Competition, 7 Risk 20 (March 1994) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1314

LASZLO N. TAUBER, M.D.,
Petitioner,

v.

SALOMON FOREX, INC., SALOMON INC., SALOMON BROTHERS, INC., and FRED GATLING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONER

The Fourth Circuit's decision is of unquestionable importance to very large markets, and there is a sharp split in the circuits, and among government agencies, over the proper meaning of the Treasury Amendment and, therefore, over what activities are permissible in those markets. Nothing in Salomon's brief in opposition undermines those fundamental reasons for granting certiorari in this case. Because Salomon makes no serious effort to defend the Fourth Circuit's opinion on its merits, we focus here on the reasons for review aside from the erroneousness of the Fourth Circuit's decision.[1]

---

[1] It is worth noting at the outset that, contrary to Salomon's intimations, Tauber has testified that he had no idea at the time of the transactions at issue here that they were illegal off-exchange trades (Tauber Dep. Tr. 308), and there is no support whatever for

1. Nothing in Salomon's discussion of the sheer impact of the Fourth Circuit's decision (Br. in Opp. 10-13) undermines the petition's showing that the decision permits exemption from the entire CEA regulatory scheme of what may be half of all the futures and options currently traded on regulated exchanges—a showing confirmed by the *amicus* brief of the Chicago Board of Trade and Chicago Mercantile Exchange. The Fourth Circuit's actual announced interpretation of the Treasury Amendment, holding that *all* foreign currency and government securities futures and options may freely be moved off the regulated exchanges and hence outside the CEA (Pet. App. 17a), applies to tens, perhaps hundreds, of millions of contracts annually. *See* Pet. 20-21; CBOT & CME *Amicus* Br. 2-3. And even under the limitation to "sophisticated, large-scale" traders that the Fourth Circuit tacked on to its opinion at the end, the impact is virtually indistinguishable, because "approximately 98% of all futures and options traded on the Board of Trade and CME are entered into by institutions or professional traders." CBOT & CME *Amicus* Br. 2; *id.* at 13.

Beyond that, Salomon can hardly claim that the Fourth Circuit's notion of "sophisticated, large-scale" traders actually limits the importance of the decision. For one thing, the Fourth Circuit did *not* hold that other traders are outside the Treasury Amendment and hence still covered by the CEA; it merely declared that its present holding, in this case, reached no further than "sophisticated, large-scale" traders, purporting to leave the question of the Treasury Amendment's application to other

---

the suggestion that Tauber entered into any such transactions after learning of the legal constraints when this litigation commenced. Moreover, it is undisputed by Salomon that, if the 68 futures contracts are illegal, Salomon is not entitled to come to court and obtain enforcement of them. It is equally undisputed that Congress has established a remedy providing strict deterrence of illegal options transactions, entitling any party suffering losses to recover damages. 7 U.S.C. § 25.

types of traders for another day. Pet. App. 22a. And Salomon could not honestly suggest a different answer to that question. After all, the Fourth Circuit gave no reason whatever tying its declared limitation to the text or analysis of the Treasury Amendment (Pet. App. 22a); and when the court did analyze the Amendment, it explicitly came to the conclusion that "all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA" (Pet. App. 17a). Indeed, it is Salomon's own view that the Fourth Circuit *could* not support its purported limit on its current judgment, since adopting that limit as a holding would be a mistake: the Treasury Amendment applies "without regard to the identity of the participants." Salomon C.A. Br. 23. *See* Pet. App. 13a.

In short, whether one accepts or discounts the Fourth Circuit's artificially appended and unjustified attempt to avoid the consequences of its express interpretation of the Treasury Amendment, including the intercircuit conflict, the ruling is of undeniable importance. Salomon's claim that the issue presented here is "narrow and factbound" (Br. in Opp. 10)—in the face of submissions by numerous government and private *amici* in this Court and in the Fourth Circuit—is groundless.

2. Salomon's brief is equally unpersuasive in trying to explain away the patent conflict among judicial (and government) interpretations of the Treasury Amendment. *See* Br. in Opp. 14-17. The Second and Seventh Circuits both have squarely *held* that the purchase and sale of options (as sued upon here, under 7 U.S.C. § 25) are outside the Treasury Amendment because they are not "transactions in [a commodity]"; and both have adopted, as their rationale, the construction of the phrase we urge —as referring only to an actual purchase and sale of the commodity (thus, as the Seventh Circuit observed, excluding futures as well as options). *See* Pet. 14-15. Under that interpretation, if what is sold is a future (not

a "forward") or an option (other than a "trade option"), then the Treasury Amendment simply does not apply, and that is so wholly irrespective of whether the parties are "sophisticated" or "large-scale" traders. By contrast, in the Fourth Circuit, "all" off-exchange futures and options involving foreign currency or government securities come within the Treasury Amendment's exclusion from the CEA (Pet. App. 17a) or at least those bought and sold off-exchange by "sophisticated, large-scale" traders (Pet. App. 22a).

These plain conflicts in constructions and holdings are matched by conflicts, and internal inconsistencies, in the interpretations offered by various government agencies, including the CFTC.[2] The resulting uncertainty about governing law—compounded by the lack of clarity even in the Fourth Circuit's own notions of "sophisticated" or "large-scale"—is intolerable, affecting as it does

---

[2] Notwithstanding its remarkable heading "There Is Unanimity in Government Views," Salomon acknowledges the wide divergence of interpretations of the Treasury Amendment proffered by various agencies of the federal government, including in separate briefs in this very case. Br. in Opp. 14-15. Salomon makes several false or misleading claims in trying to avoid that fact. First, Salomon is wrong in twice asserting (*id.* at 9, 14) that the CFTC in this case urged the Fourth Circuit to affirm the district court judgment: the CFTC brief conspicuously avoids any such assertion with respect to the futures contracts that Salomon seeks to enforce. Second, with respect to options (*see id.* at 14 n.17), the CFTC's only stated view on the Fourth Circuit's position on options *disagrees* with that position and instead agrees with our view (and that of the Second and Seventh Circuits) that the off-exchange sale of options is illegal. *See* Pet. 17-18. (The CFTC's argument in the Fourth Circuit regarding options, which was correctly disregarded by the court, has nothing to do with the legality of the *sale* of options, the issue here under 7 U.S.C. § 25.) Third, the 1975 CFTC Staff interpretation's "acknowledgment that the Treasury Amendment applies to off-exchange contracts" (Br. in Opp. 15) refers, of course, to spot and forward contracts, *not* futures or options; the interpretation expressly adopts precisely our view of the Treasury Amendment. *See* Pet. 5 n.4.

a very large volume of futures and options transactions. *See* Pet. 13 n.10 (CFTC noting need for correcting current confusion); *see also* CBOT & CME Br. 18 (ABA committee chairman noting "unsettled" state of law after Fourth Circuit decision). Resolution of such uncertainty is the classic function of this Court in statutory cases.

3. Salomon's principal effort to downplay the circuit conflict, and to diminish the importance of the Fourth Circuit's decision, is its pervasive reliance on a contrast between "privately-negotiated, off-exchange transactions among professional[s]" and "trading of standardized contracts conducted on or over an exchange." Br. in Opp. 16. There are several reasons why this distinction neither dissolves the circuit conflict nor discounts the decision's impact. It therefore offers no reason whatever for denying the petition.[3]

Thus, the factors relied upon by Salomon are in no way relevant under, or mentioned by, either the Second or the Seventh Circuit opinions in explaining their adoption of their construction of the Treasury Amendment, under which transactions in futures (not forwards) and options are specifically distinguished from "transactions in [the specified commodities]." Moreover, as already noted,

---

[3] We note that Salomon's other grounds for dealing with the Seventh Circuit decision, aside from being inapplicable to the Second Circuit decision, fare no better. Br. in Opp. 16-17 (discussing *Board of Trade v. SEC*, 677 F.2d 1137, *vacated as moot*, 459 U.S. 1026 (1982)). The Seventh Circuit decision, while vacated for mootness, continues to be authoritative in both the Seventh Circuit and elsewhere, as the CFTC has observed. *See* Pet. 15 n.11. The Seventh Circuit *did* explicitly rule on the Treasury Amendment (677 F.2d at 1154), in addition to another CEA provision; and its ruling as to government securities fully applies to foreign currency, because both are commodities listed in the Amendment. And the subsequent Seventh Circuit decision in *Abrams v. Oppenheimer Gov't Securities*, 737 F.2d 582 (7th Cir. 1984), written by the same judge as *Board of Trade*, expressly involved "forwards," which are legally distinct from "futures" under the CEA (*see* Pet. 5-6) and which *Abrams* expressly distinguished from futures. 737 F.2d at 585-87, 590.

the Fourth Circuit itself offered no explanation tying these factors to the *Treasury Amendment*; and Salomon, for its part, not only fails to offer any such explanation but has affirmatively argued that the factors are wholly irrelevant to the Treasury Amendment. *See* page 3, *supra*. Decisions cannot be legitimately distinguished on the basis of a *mistaken* reading of the statute.

What Salomon is doing, in fact, is trying to change the issue without openly saying so. The issue to which the identified factors *have* been argued to be relevant (incorrectly, *see* Pet. 5 n.5) is the question whether particular contracts are "forwards" or "futures"—but that issue has nothing whatever to do with options, is irrelevant to the validity of the Fourth Circuit's ruling that *futures* are within the Amendment (*e.g.*, Pet. App. 2a, 13a, 17a, 19a, 22a), and is open for litigation if the summary judgment for Salomon is reversed.[4] It is also worth noting why the suggested distinction cannot be the basis for determining application of the CEA: after all, even on-exchange instruments may be individually negotiated (*see The Lookalike Competition*, 7 Risk 20 (March 1994)); the CEA has always covered "professionals" as well as the "public"; and whether a transaction is subject to the CEA's fundamental requirement of on-exchange trading (7 U.S.C. §§ 6, 6c) cannot logically depend on whether the transaction is conducted on-exchange. *See In re Bybee*, 945 F.2d 310, 313 (9th Cir. 1991).[5]

---

[4] The district court specifically held that a trial would likely be required in order for Salomon to try to establish that the contracts at issue were "forwards" or "trade options." Pet. App. 30a n.4, 32a n.8.

[5] Salomon makes a brief and wholly novel reference to a CFTC rule on "swap agreements." Br. in Opp. 11 n.13. But the Fourth Circuit decision is a holding about the Treasury Amendment, which excludes certain transactions from the CEA in its entirety; the swap rule, even where it applies, leaves transactions subject to various provisions of the CEA and CFTC jurisdiction. 58 Fed. Reg. 5587 (1993). Notably, Salomon never suggested to the Fourth Circuit that this rule was a basis for prevailing, even

In sum, in addition to being incorrect,[6] the Fourth Circuit decision should be reviewed because the proper interpretation of the Treasury Amendment is a matter of patent importance on which there is obvious disagreement and uncertainty, and Salomon's ground for treating the case as insignificant, which Salomon itself deems immaterial under the provision, is meritless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD G. TARANTO
(Counsel of Record)
H. BARTOW FARR, III
FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

March 24, 1994

---

though the rule appeared before Salomon even filed its last brief, months before the oral argument and decision in this case. That omission is hardly surprising given that the transactions at issue here, *unlike* other transactions Salomon entered into with Tauber, were not called "swaps" by the parties; the rule does not purport to resolve the Treasury Amendment issue; and the CFTC, in its October 1993 Report to Congress on this very case, made no reference to the swap rule. It is also peculiar to suggest that a transaction removed from the CEA by the Treasury Amendment can be subject to CFTC authority applicable only to transactions covered by the CEA.

[6] It is worth noting one important error in Salomon's discussion of the legislative history of the Treasury Amendment. Br. in Opp. 19. Although Salomon claims that "petitioner is simply wrong in asserting that congressional committees avoided 'any reference to futures' in their comments on the Treasury Department's proposed amendment" (*ibid.*), all that Salomon is referring to is, naturally enough, the committee's description of *what the Treasury Department said in its letter*. The committee said not one word about futures, much less options, in its *own* description of the legislation or of what *it* understood the law to do.